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No. 84-1758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DURANTE BROS. AND SONS, INC.,

Petitioner,

– against –

NATIONAL BANK OF NEW YORK CITY, JACK FARBER and RICHARD GELMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MILTON S. GOULD
Attorney for Respondents
SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Of Counsel:
FRAN M. JACOBS
PETER C. NEGER

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QUESTION PRESENTED

Whether it is error for a trial court to follow the general rule that jury verdicts should be reconciled whenever it is logically possible to do so, rather than to treat verdicts as inconsistent even though no inherent inconsistency exists.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Over the course of a four week trial which consisted entirely of petitioner's affirmative case, petitioner sought to persuade the jury that it had been the victim of a fraudulent scheme allegedly perpetrated by respondents National Bank of New York City (the "Bank"),[1] Jack Farber ("Farber"), and Richard Gelman ("Gelman"). At the close of petitioner's case, the District Court

[1] National Bank of New York City was formerly known as Flushing National Bank.

submitted only two of its 17 claims to the jury.[2] The jury was asked to render general verdicts in favor of or against each respondent. Neither petitioner nor respondents requested that the general verdicts be accompanied by written interrogatories as provided for in Fed. R. Civ. P. 49(b), and the jury therefore made no special findings with respect to any of the factual issues underlying its general verdicts.[3]

On petitioner's common law fraud claim, the jury returned general verdicts for Farber and against the Bank.[4] On its claim that respondents had engaged in fraud through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), the jury found in favor of all three respondents.[5]

Respondents immediately moved, pursuant to Fed. R. Civ. P. 50(b), to set aside the jury's verdict against the Bank on the

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[2] Prior to trial, the District Court granted summary judgment dismissing petitioner's usury-related claims (A59, 571 F. Supp. 489, 495 (E.D.N.Y. 1983)). It also dismissed petitioner's claims under 12 U.S.C. § 161, 18 U.S.C. §1005, and 18 U.S.C. § 1014 following petitioner's inability to establish in an offer of proof that it sustained any injury as a consequence of respondents' purported violations of these statutes. At the close of petitioner's case, the District Court directed a verdict dismissing all but two of petitioner's remaining claims.

[3] Petitioner's allusion in its petition to Fed. R. Civ. P. 49(b) — a provision to which it has never before made reference in any proceedings herein — is wholly irrelevant. The jury in this case simply was not asked to respond to written interrogatories on factual issues and therefore cannot conceivably be held to have rendered special factual findings which were inconsistent with its general verdict. Rule 49(b) applies only when such special factual findings are made.

[4] No common law fraud claim was asserted against Gelman.

[5] Although the Court of Appeals purported to affirm the dismissal of petitioner's RICO claim for fraud on the ground, *inter alia*, that the complaint did not allege an injury resulting from a pattern of racketeering activity (A15-A16, 755 F.2d 246, 247 (2d Cir. 1985)), the District Court did not actually dismiss that claim. Rather, the jury had rendered verdicts holding that respondents were not liable for a violation of RICO.

ground that evidence relating to petitioner's dealings with Bank representatives other than Farber was insufficient to support a finding that the Bank had committed fraud. In opposition to this motion, petitioner contended that the jury could have based its verdict against the Bank on the conduct of eight Bank employees other than Farber (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict or for a New Trial, p. 11).[6] In particular, petitioner sought to single out Gelman as the Bank official on whose actions the verdict against the Bank had been predicated. Petitioner argued in a letter to the District Court that "the jury properly could have based its fraud finding against the Bank on the statements, actions and inactions of defendant Gelman, separately and in combination with proof concerning other Bank agents and employees, *regardless of the Farber verdict*" (emphasis added).[7]

Thus, as petitioner itself recognized, if the proof of petitioner's dealings with Bank representatives other than Farber had included clear and convincing evidence of a knowingly false representation on which petitioner might reasonably have relied, then the verdict against the Bank could have been upheld even in the face of the verdict for Farber. Because the District Court found that the jury could not rationally have based its verdict against the Bank on the evidence petitioner adduced at trial of its dealings with Bank representatives other than Farber, it granted the Bank's motion for judgment notwithstanding the verdict.

At no point in its decision did the District Court suggest that it was setting aside the verdict against the Bank because it

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[6] Petitioner had earlier requested that the jury be charged that "[t]he Bank is responsible for the acts of Erwin Bleiweiss and Mark Gemo [two Bank employees] if they acted within the scope of their authority as loan officers . . . ." (Plaintiff's Requests for Instructions No. 18, p. 28.)

[7] Letter from Myron Beldock to Hon. Eugene H. Nickerson, dated December 19, 1983.

regarded that verdict as irreconcilably inconsistent with the verdict for Farber. On the contrary, the District Court indicated that its decision to set aside the verdict against the Bank was not based upon a belief that the verdict had to — but could not — be reconciled with the verdict for Farber, but upon its inability, after reconciling the verdicts, to find clear and convincing evidence of fraud by any of the other Bank representatives whom petitioner had attempted to implicate.

Following the District Court's entry of judgment notwithstanding the verdict, petitioner moved for a new trial on the wholly mistaken assumption that the District Court had granted the Bank's motion for judgment notwithstanding the verdict because the jury's verdict against it was facially inconsistent with the verdict for Farber. The District Court summarily rejected petitioner's motion, noting that its "basic premise . . . that the jury verdict was inconsistent, is erroneous" (A75-76).

Faced with the District Court's explicit statement that the verdict against the Bank had *not* been set aside because it was inconsistent with the verdict for Farber, petitioner contended in its brief to the Court of Appeals that the District Court was mistaken about its own reasons for granting the Bank's motion. Working from this peculiar premise, petitioner then argued that "[t]he [District] Court's finding that the jury reached an inconsistent verdict mandates that a new trial be granted" (Appellant's Brief, p. 35). At the same time — and apparently without recognizing the internal illogic of its position — petitioner argued that the verdicts for Farber and against the Bank were not patently inconsistent and that both could therefore stand.[8]

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[8] Petitioner argued as follows in its brief to the Court of Appeals (Appellant's Brief, pp. 32-33):

> John Durante and Martin Goldhaber testified that each told Bleiweiss [a Bank loan officer] that [petitioner] was going to borrow $100,000 from its factor to buy Parcel B and that Bleiweiss told them "fine" (A. 357-358), the Bank would replace the money "almost immediately." "Don't be afraid" (A. 565).
>
> (footnote continued)

Like the District Court, the Court of Appeals recognized that the fact that the verdicts were consistent did not necessarily mean that they could both stand: there still had to be clear and convincing evidence of fraud by one of the Bank representatives other than Farber on whose conduct petitioner argued the jury might have based its verdict against the Bank. After reviewing the trial record, the Court of Appeals held that "[t]he district court did not err in concluding that, given the verdict in favor of Farber on count 8, the claim of fraud against the Bank had not been proven by clear and convincing evidence" (A26, 755 F.2d at 251).

This petition, like petitioner's earlier applications to the District Court and the Court of Appeals, rests upon a fundamental misconception about why the verdict against the Bank was set aside. Since neither of the courts below held that judgment notwithstanding the verdict should have been granted because the verdict against the Bank was inconsistent with the verdict for Farber — but instead found that, even though consistent with the verdict for Farber, the verdict against the Bank could

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(footnote continued from previous page)

> Gelman, too, was most seriously implicated. He knew that DB&S was borrowing from its factor to purchase Parcel B since he initialed the Bank's checks that DB&S used (A. 660, 976-77). Gelman instructed Bleiweiss to block DB&S' accounts on December 18, 1975 (A. 914). Gelman requested an income and expense statement (A. 891) and then sent a questionable letter claiming the information was not sufficient (A. 997). Gelman conducted the February 24, 1976 meeting at which DB&S was required to assume Louis Durante, Sr.'s loan and to give the Bank a consolidated mortgage on both parcels. He made the threats to foreclose the mortgage, throw DB&S out of the Bank and take John Durante's children's trust accounts (A. 366-69). Gemo, Jeff Shankman, a Bank vice president, Robert Klein, the new Bank president, as well as Farber, were at the meeting. Gelman prepared and was in charge of the crucial missing February 1976 Loan Committee minutes (A. 630a, 630b, 733b, 767a).
>
> These are some examples of the abundant evidence of the involvement of those other than Farber. . . .

not have been rationally reached based on the evidence adduced at trial — this case is unaffected by any purported conflict among the Circuits with respect to facially inconsistent verdicts in civil cases.

ARGUMENT

THIS CASE INVOLVES NO CONFLICT AMONG THE CIRCUITS OR ANY OTHER ISSUE WHICH MIGHT WARRANT REVIEW ON CERTIORARI

Petitioner has asked this Court to grant a writ of certiorari solely in order to resolve a purported conflict among the Circuits with respect to the treatment of irreconcilably inconsistent verdicts in civil cases. This case does not, however, involve irreconcilably inconsistent verdicts. As plaintiff itself conceded in its brief to the Court of Appeals, "[t]he seemingly inconsistent verdicts are reconcilable" (Appellant's Brief, p. 34).

Neither the District Court nor the Court of Appeals regarded the jury's verdicts for Farber and against the Bank as irreconcilable, and neither court based its decision in this case on a finding that the jury had rendered inconsistent verdicts. On the contrary, in its decision denying petitioner's motion for a new trial, the District Court specifically stated that it had set aside the jury's verdict against the Bank, not because it was inconsistent with the verdict for Farber, but because the evidence of fraud by Bank representatives other than Farber was inadequate to support a verdict against the Bank (A75-A76):

> *The basic premise of the motion, namely, that the jury verdict was inconsistent, is erroneous. Indeed, plaintiff earlier argued that there was adequate evidence to support the verdict against the Bank even though Farber did not perpetrate a fraud.* While this court did not find that argument persuasive, the jurors may well have accepted it, albeit erroneously.
>
> (Emphasis added.)

Thus, even if plaintiff were correct that the Circuits are at odds in their handling of civil cases involving inconsistent verdicts, the existence of such a conflict would be wholly irrelevant

to this case.[9] Under the circumstances, petitioner's request for review on a writ of certiorari should be denied.

Rule 17.1 of the Rules of the Supreme Court of the United States provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." While Rule 17.1(a) indicates that certiorari may be appropriate where "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter," that rule has no applicability to this case since the issue on which the circuits are purportedly in conflict — whether the rule that permits inconsistent verdicts to stand in criminal trials also applies in civil trials — was not an issue herein. Petitioner has thus posed a question that is, at best, of academic interest. As such, it is not an appropriate subject for a writ of certiorari.

In describing the type of question that may properly warrant the granting of a writ of certiorari, this Court stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and

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[9] It is by no means clear that the conflict that petitioner perceives actually exists. While there is language in some cases suggesting that inconsistent verdicts may stand, the Circuit Courts deciding those cases have gone on to find that the verdicts were only superficially inconsistent and that they could be reconciled. *See, for example, Merchant v. Ruhle*, 740 F.2d 86, 91 (1st Cir. 1984) (court not only succeeded in reconciling verdicts, but stated that inconsistent verdicts could *not* stand in "egregious" cases); *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975); *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co. Ltd.*, 226 F.2d 875, 881-882 (9th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956). On the other hand, where the verdicts could not possibly be reconciled under any set of facts, the Circuit Courts have remanded the cases for new trials. *See, for example, Barnes v. West Point Foundry and Machine Co., Inc.*, 441 F.2d 532 (5th Cir. 1971); *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970); *Witt v. Norfe, Inc., supra*, 725 F.2d 1277, 1280 (11th Cir. 1984).

> solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *"Special and important reasons" imply a reach to a problem beyond the academic* or the episodic.
>
> (Emphasis added and citation omitted.)

There are no "special and important" reasons for further appellate review of this case.

The issues relating to the jury verdicts herein are essentially factual. The District Court was not faced with verdicts which were irreconcilable under any set of facts. Rather, as petitioner, the District Court, and the Court of Appeals each recognized, no inherent conflict existed between the verdict for Farber and the verdict against the Bank because Bank representatives other than Farber dealt with petitioner, and their dealings could have been the basis of the jury's verdict against the Bank.[10] Petitioner

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[10] Since this case did not involve facially inconsistent verdicts, it is immediately distinguishable from the principal cases on which petitioner relies. For example, in *Barnes v. West Point Foundry and Machine Co., Inc.*, 441 F.2d 532 (5th Cir. 1971), claims arising out of an automobile accident were asserted against an employee and his employer, a corporation which plaintiff sought to hold liable solely on the theory of respondent superior. The jury returned a verdict against the employer, but for the employee whose conduct was the *only possible basis* for the employer's liability. Unlike the verdicts herein, the two verdicts in *Barnes* were hopelessly irreconcilable.

Similarly, in *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970), the jury returned four absolutely irreconcilable verdicts. In effect, the jury ruled both for and against plaintiff on the very same claim. No possible set of facts existed in *Hopkins* which might have accounted for the jury's different verdicts. That is not so in this case.

In another of the cases cited by petitioner, *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1280 (11th Cir. 1984), the Circuit Court held "the jury's first and second findings... that the door was not defective, [and] its third finding... that the door was defective... are *irreconcilably* contradictory" (emphasis added). No such finding was made in this case. Indeed, the District Court herein specifically held that it had *not* found the verdicts for Farber and against the Bank inconsistent.

(footnote continued)

had, in fact, argued in its brief to the Court of Appeals that there was "abundant evidence of the involvement of those other than Farber" in the fraudulent scheme for which it sought to hold the Bank liable (Appellant's Brief, p. 33).

Based on the District Court's assessment of the sufficiency of the evidence of petitioner's dealings with Bank representatives other than Farber — evidence which petitioner claimed was by itself sufficient to support the jury's verdict against the Bank — the District Court set aside the verdict against the Bank. (*See* A72-A73.)

After reviewing the trial record, the Court of Appeals concluded that "[t]he remaining evidence as to statements by other Bank officials, even viewed in the light most favorable to [petitioner] and with all permissible inferences drawn in its favor, was woefully inadequate to support a claim of fraud" (A26, 755 F.2d at 241, citations omitted). The Court of Appeals therefore upheld the District Court's decision setting aside the verdict against the Bank. It is the propriety of this essentially factual finding that petitioner would now have this Court review.

This Court has made clear that certiorari should not be granted to review factual findings because "their review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 *reh. denied*, 371 U.S. 854 (1962). Petitioner cannot avoid the effect of this fundamental rule by claiming that the courts below erred in excluding evidence of Farber's involvement from their evaluation of the evidence on which the jury might have based its verdict against the Bank.

(footnote continued from previous page)

Equally dissimilar to this case is *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865 (10th Cir. 1976), where a jury was alleged to have rendered irreconcilably inconsistent verdicts because it assigned different degrees of negligence to the corporate defendants and the individual defendants for whose conduct the corporate defendants were held vicariously liable. In view of the peculiar procedural posture that the case was in on appeal because all but one defendant had settled, the court declined to grant any further relief.

The District Court's exclusion of evidence relating to Farber eliminated any possibility of an inconsistency in the jury's verdicts and is therefore not in conflict with the law of any Circuit. The Circuit Courts are in agreement that verdicts should be treated as inconsistent only after every attempt to reconcile them has failed. *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1278 (11th Cir. 1984) ("In order to qualify as inconsistent . . . there must be 'no rational, non-speculative way to reconcile . . . two essential jury findings'"); *Quinby v. Morrow*, 340 F.2d 584, 585 (2d Cir. 1965) (court refused to find inconsistency in verdicts because there was a logical way to reconcile them); *Stone v. City of Chicago*, 738 F.2d 896, 900 (7th Cir. 1984) (court "fail[s] to apprehend the irreconcilable conflicts which appellants claim to have uncovered. There are logical and plausible explanations for the jury's verdicts. . . .").

Even in *Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984), the case that petitioner describes as the only one "that has directly addressed the applicability of *Dunn* to civil cases" (Petition, p. 10), the Circuit Court actually indicated that it was possible to reconcile a verdict holding defendant liable for negligence with an allegedly inconsistent verdict finding that defendant's vessel was not unseaworthy. The First Circuit noted that "the jury could have felt that the penboards, not being defective or generally dangerous, did not constitute unseaworthiness, but that to require the crew to use them while they were being sprayed with ice was negligence." *Id.*, 740 F.2d at 91. In addition, the Circuit Court in *Merchant* specifically found that each of the jury's verdicts "had some basis." *Ibid.* Precisely the opposite finding was made by both the District Court and the Circuit Court herein. (*See* A26, A73, A76.)

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[11] Petitioner's claim that the Ninth Circuit adhered to *Dunn v. United States*, 284 U.S. 390 (1932) in *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co., Ltd*, 226 F.2d 875, 881-882 (9th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956), is not accurate. Although *Dunn* is referred to in dictum, the court did not need to rule on its applicability to civil cases because it held that it was bound to assume that the jury had *not* rendered inconsistent verdicts, particularly since "there are combinations of permissible findings that were not inconsistent."

Indeed, even petitioner acknowledged in its brief to the Court of Appeals the existence of a rule of "broad application[] that the trial court should reconcile the jury's verdict if at all possible" (Appellant's Brief, p. 29).[12] Both the District Court and the Court of Appeals did precisely what petitioner argued they should have done: they reconciled the verdicts that the jury rendered with respect to petitioner's fraud claims against the Bank and Farber. Thus, petitioner's quarrel is not with the lower courts' methodology, but with their conclusion that, even though consistent with the verdict for Farber, the verdict against the Bank could not stand because the evidence supporting it was "woefully inadequate" (A26, 755 F.2d at 251).

Where the evidence is inadequate to support a jury's verdict, it may not stand, whether or not it is consistent with other verdicts rendered by the same jury. In fact, in *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524 (5th Cir. 1984), one of the cases on which petitioner relies, the Circuit Court made clear that it had upheld an allegedly inconsistent verdict only after determining that it was supported by the evidence, stating that " 'even if the general verdicts are internally inconsistent, such is the jury's prerogative *if, as we have found, there is evidence to support the finding reached by the jury,*' " quoting

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[12] In its brief to the Court of Appeals, petitioner cited *Gallick v. Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963), and *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975), as support for the proposition that a trial court must reconcile a jury's verdicts whenever it is possible to do so (Appellant's Brief, p. 29). While *Gallick* involved a claim that a jury had rendered inconsistent responses to interrogatories submitted pursuant to Fed. R. Civ. P. 49(b), *Henry*, like this case, appears to have involved allegedly inconsistent general verdicts on different claims. After noting the "[t]he general rule that a court should reconcile the jury's verdicts if at all possible is entitled to broad application," 512 F.2d at 406 (citation omitted), the court in Henry held that "[n]o straining is required in this case. . . to reconcile what might at first blush appear to be an inconsistency." *Ibid.* That is equally true herein. The only difference between this case and *Henry* is that here, after reconciling the verdicts, the remaining evidence was inadequate to support one of the verdicts, while in *Henry* the evidence apparently supported both verdicts.

Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1094 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (emphasis added).[13]

Despite petitioner's recognition that verdicts should be reconciled whenever possible, it is now arguing that the courts below erred because they reconciled the verdicts — as they were required to do — rather than treated them as inconsistent. Petitioner cites no authority from any Circuit which suggests that, where it is possible to reconcile two verdicts, a district court should not do so, but should instead assume that the jury intended to render inconsistent verdicts. That is simply not the law anywhere.

In effect, this petition amounts to nothing more than an attack upon the lower courts' conclusion, after reconciling the verdict for Farber and against the Bank, that the evidence on which the verdict against the Bank might have been based was insufficient to sustain a finding of fraud. This petition thus raises no "special and important" issues which might warrant review on a writ of certiorari and, accordingly, it should be denied.

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[13] Significantly, although petitioner quotes the entire portion of the paragraph preceding this sentence in *Jackson v. Johns-Manville Sales Corp.*, *supra* (Petition, p. 11), the sentence itself does not appear in petitioner's brief.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MILTON S. GOULD

Attorney for Respondents
SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Of Counsel:
FRAN M. JACOBS
PETER C. NEGER